



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 9, 2005

Mr. Brad Norton
Assistant City Attorney
City of Austin
P. O. Box 1088
Austin, TX 78767-8845

OR2005-01176

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 218552.

The Austin Airport Police Department (the "department") received a request for information relating to the requestor's transfer of a federal fugitive and transportation of a firearm aboard a commercial airplane. You state that the department does not have a portion of the requested information and that another portion does not exist. We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You claim that the remaining requested information is excepted from disclosure under section 552.108 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

¹We note you have also raised sections 552.107 and 552.117 of the Government Code as exceptions to disclosure of the information, but made no arguments in support of these exceptions. See Gov't Code § 552.301. Therefore, this ruling does not address whether any of the submitted information is excepted under sections 552.107 or 552.117 of the Government Code.

Initially, we note that the requestor seeks a specific facsimile, which you have not submitted for our review. We therefore assume you have released such responsive information to the requestor to the extent it exists. If not, you must do so at this time. *See* Gov't Code § 552.301(e), .302.

We next note that the submitted information contains a court-filed document. Information filed with a court is generally a matter of public record that cannot be withheld from disclosure. Gov't Code § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Therefore, under section 552.022 this public court document must be released to the requestor unless it is confidential under other law. Section 552.108 is a discretionary exception under the Act, and is therefore not "other law" that makes information confidential. *See* Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108). Therefore, the court document we have marked must be released to the requestor pursuant to section 552.022(a)(17).

You assert that the remaining information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a)(1) generally excepts information held by a law enforcement agency that deals with the detection, investigation, or prosecution of crime, if release of the information would interfere with the detection, investigation, or prosecution of crime. *See* Gov't Code §§ 552.108(a)(1). A governmental body that claims information is excepted from disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See* Gov't Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. This office has concluded, however, that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983).

You explain that an Assistant United States Attorney ("AUSA") objects to the release of the remaining submitted information because it relates to a pending criminal investigation being conducted by the FBI and U.S. Attorney's office in Alaska. You have also submitted a letter from the AUSA confirming that criminal investigations are being conducted and requesting that the information at issue not be released. Based upon these representations and our review, we conclude that the release of the remaining information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, the department may withhold the remaining information under section 552.108(a)(1) of the Government Code.

In summary, the court-filed document must be released pursuant to section 552.022. If the facsimile the requestor seeks exists, then it must be released at this time. The department may withhold the remaining information under section 552.108(a)(1).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

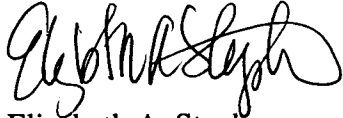
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'Elizabeth A. Stephens', written in a cursive style.

Elizabeth A. Stephens
Assistant Attorney General
Open Records Division

EAS/krl

Ref: ID#218552

Enc. Submitted documents

c: Mr. Michael Tierney
2100 County Road 448
Taylor, TX 76574
(w/o enclosures)